Supreme Court, U. S.
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APPENDIX

In the Supreme Court of the United States

OCTOBER TERM, 1977

No. 76-1382

UNITED STATES OF AMERICA,
Petitioner

—*v.*—

JOHN ARTHUR SCOTT

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI FILED APRIL 8, 1977
CERTIORARI GRANTED OCTOBER 11, 1977

In the Supreme Court of the United States

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UNITED STATES OF AMERICA,

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—*v.*—

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ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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* The opinion of the court of appeals is reproduced as Appendix A to the petition for a writ of certiorari. The judgment of the court of appeals is reproduced as Appendix B, the order of the court of appeals denying rehearing is reproduced as Appendix C, and the oral opinion of the district court is reproduced as Appendix D to the petition.

RELEVANT DISTRICT COURT DOCKET ENTRIES

DATE	PROCEEDINGS
1975	
March 5	Filed Indictment
Apr. 7	Filed Motion To Dismiss Counts I and II Of Indictment
Sept. 25	Hearing on motion to dismiss held before Judge Fox., as to Counts 1 & 2 and (2) for severance of all counts. Taken under advisement.
Nov. 20	Filed Order on Motions to Dismiss Counts I and II, and to sever all counts to be tried. Order s/ Judge Fox; d/11/20/75.
Dec. 1	Jury trial commenced. (1) Jury drawn by Magistrate S. Karr.
Dec. 2	Jury trial continued. (2)
Dec. 3	Jury trial continued. (3) Defendant's motion to dismiss counts 1 & 2—denied. Motion for judgment of acquital by deft—denied.
Dec. 4	Jury trial continued. (4) Defendant renewed his motion to dismiss cts. 1 & 2—taken under advisement.
Dec. 5	Jury trial continued. (5) Defendants motion to dismiss is granted as to count 1 and 2. Defendant's motion for directed acquital is denied
Dec. 5	Jury verdict—not guilty on count 3.
Dec. 10	Filed Jury Verdict.
Dec. 31	Filed Plaintiff's Notice of Appeal from dismissal of 12-5-75 Ct. 2
1976	
Jan. 29	Filed Plaintiff's Notice of Appeal from dismissal of Count 1 of the Indictment on 12-5-75

RELEVANT COURT OF APPEALS DOCKET ENTRIES

DATE	FILINGS—PROCEEDINGS
1976	
Oct. 21	Cause argued by Robert C. Greene for Appellant, by William C. Marietti for Appellee and case submitted to the Court (Before: Phillips, Weick and Peck, JJ.)
Nov. 23	Judgment dismissing appeal for lack of jurisdiction (No Costs)
Nov. 23	Opinion Per Curiam
1977	
Feb. 8	Order denying petition for rehearing (Phillips, Weick and Peck, JJ.)

INDICTMENT

UNITED STATES OF AMERICA
IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MICHIGAN,
SOUTHERN DIVISION

No. G 75-54 Cr.

UNITED STATES OF AMERICA, PLAINTIFF

—*vs*—

JOHN ARTHUR SCOTT, DEFENDANT

The Grand Jury charges:

Count 1

That on or about September 20, 1974, in the City of North Muskegon, in Muskegon County, in the Southern Division of the Western District of Michigan,

JOHN ARTHUR SCOTT

knowingly and intentionally did unlawfully distribute approximately .117 of a gram of cocaine, a Schedule II narcotic drug controlled substance.

21 U.S.C. § 841 (a) (1)

Count 2

That on or about September 24, 1974, in the City of North Muskegon, in Muskegon County, in the Southern Division of the Western District of Michigan,

JOHN ARTHUR SCOTT

knowingly and intentionally did unlawfully distribute approximately 1.0 gram of a white powdered substance

containing codeine, an opium derivative, a Schedule II narcotic drug controlled substance.

21 U.S.C. § 841(a)(1)

Count 3

That on or about January 22, 1975, in the City of Muskegon, in Muskegon County, in the Southern Division of the Western District of Michigan,

JOHN ARTHUR SCOTT

knowingly and intentionally did unlawfully distribute approximately 1.8 grams of a light brown powdered substance containing heroin hydrochloride, a Schedule I narcotic drug controlled substance.

21 U.S.C. § 841(a)(1)

A TRUE BILL

_____

Foreman

_____

Frank S. Spies
United States Attorney

UNITED STATES DISTRICT COURT
FOR THE
WESTERN DISTRICT OF MICHIGAN

_____

THE UNITED STATES OF AMERICA

—*v*—

JOHN ARTHUR SCOTT

_____

MOTION TO DISMISS COUNTS I AND II
OF INDICTMENT

The Defendant, John Arthur Scott, moves that Counts I and II of the indictment in the above entitled cause be dismissed pursuant to Rule 12 of the Federal Rules of Criminal Procedure on the following grounds:

1. The government unnecessarily and intentionally delayed a period of approximately five and one half months before seeking an indictment on Count I.
2. The government unnecessarily and intentionally delayed a period of approximately four months before filing a complaint and warrant and arresting Defendant for the offense set forth in Count II.
3. The unjustified and unreasonable delay set forth in paragraphs one and two hereof resulted in prejudice of a substantial nature to the Defendant in the preparation of his defense due to the inability of the Defendant to reconstruct accurately and recollect the facts and circumstances surrounding the offenses alleged in Counts I and II.
4. The aforesaid delays prevent Defendant's witnesses from accurately recollecting and reconstructing the events surrounding the offenses alleged in Counts I and II.
5. The intentional delay set forth herein was not justified by any motive of the government to ensure the fair

and efficient execution of law enforcement functions, but rather constituted a form of harassment and was designed to disadvantage the Defendant in the preparation of his defense.

6. The intentional, unnecessary, unreasonable and prejudicial delays set forth herein resulted in a denial of due process guaranteed to the Defendant by the fifth amendment to the Constitution of the United States.

Dated: April 3, 1975

/s/ William C. Marietti
WILLIAM C. MARIETTI
Attorney for Defendant

BOESCHENSTEIN, MARIETTI, MULLALLY & GRIMM
820 Terrace at Clay
Muskegon, Michigan 49440

[2]

Grand Rapids, Michigan
Thursday, September 25, 1975
2:28 P.M.

PROCEEDINGS

THE COURT: You may proceed in this case.

MR. MARIETTI: Your Honor, we have brought a motion, two motions here to be heard by the Court today in this matter, one being a Motion for Dismissal of Counts I and II, and another being a Motion for Severance of the three counts for the purposes of trial.

I would assume that it would be most appropriate to deal with the dismissal motion first.

THE COURT: All right.

MR. MARIETTI: As to that motion, our position is fairly well stated in the brief which was filed with the Motion back in April. There are a few matters that I would like to point out to the Court by way of oral argument at this time that were raised in the brief that was submitted by the United States Attorney on the Motion to Dismiss.

In the United States Attorney's brief, he has cited and furnished a copy to you of United States of America versus Anthony Giacalone, a Sixth [3] Circuit case, which the District Attorney asserts stands for the proposition that it is incumbent upon the defendant in a motion of this nature to establish an intentional governmental delay in the matter.

We submit that is not what the Giacalone case says.

There is a recent case I would like to cite to the Court that I just became aware of that has cited the Giacalone case. The name of the case is Hamilton v. Lumpkin, L-u-m-p-k-i-n, 389 F.Supp. 1069, 1975, Eastern District of Virginia.

THE COURT: What is that?

MR. MARIETTI: Eastern District of Virginia.

THE COURT: The citation?

MR. MARIETTI: 389 F.Supp. 1069.

Now basically what we are talking about in this motion, your Honor, is not the Sixth Amendment Speedy

Trial question. The District Attorney spends most of his brief dealing with cases that dealt with the Sixth Amendment Speedy Trial issue. We are not dealing with that. We are dealing with due process as it is defined in the Fifth Amendment to the Constitution, and that is what the Giacalone case addresses itself to, was the due process question.

[4] Now in this case we are talking about a delay from September 20th of 1974 to sometime in the middle part of March before an Indictment was returned against this defendant on Count I. In the meantime, the Drug Enforcement Administration had proceeded to accumulate further evidence using the same informant against this defendant on September 20th and January 22nd.

Now the question arises in my mind, and I feel it should arise in the Court's mind, is what purpose was served by the delay, what governmental purpose was served by the delay from September 20th to March 20th, roughly March 20th, in bringing this first count? Was it the purpose of concealing the identity of the informant? That was revealed on January 22nd, that was revealed at a preliminary examination subsequent thereto. What was the purpose in that delay, if it wasn't to confuse and confound this defendant in the preparation of his defense? Why we have this delay is the question I am here to ask. I submit there has been a denial of due process, of what has been defined as substantial fair play.

This defendant has extreme difficulty recalling those events. He was an undercover narcotics officer dealing with many cases.

[5] THE COURT: The defendant was an undercover—

MR. MARIETTI: The defendant was an undercover narcotics' officer for the Central Narcotics Bureau, the County of Muskegon, and the prosecution was well aware that this man was dealing with a lot of—a lot of cases in the course of his work, and yet they held off. They held off till March before they did anything about informing this man of any charges against him.

Now why? Why when they had an informant who had already been accused by this defendant—as a matter

of fact, had a case pending for sale of Heroin accused by this defendant, why did they hold off? If they had such a great case back in September, why did they wait? Why are we still waiting now? Are we waiting because now the man has got three more charges against him and they have got another hammer to use on him?

I grant to the Court that we don't have a speedy trial motion here, but this is some information that just came to my attention this last weekend. Now this man is sitting here accused by someone he had accused previously, and he is sitting there accused by a man who has got four charges pending [6] against him. Is that due process, that kind of a delay, to accumulate more hammers, more vices to use on an already obviously scared informant, an informant who has a lot to gain, because the only man standing between him and the prison sentence is this man here; is that due process? Do we have to show, as the Prosecutor sets forth, both an intentional delay on the part of the Government and substantial prejudice?

Well, I submit there has been an intentional delay; there has been an intentional delay because the informant was revealed as early as January. What other reason did they have for delaying these charges until March except to subject this defendant to further confusion and the further possibility and the actuality now of the lapse and dimming of a memory?

Now as far as the actual prejudice goes or the substantial prejudice, the Marion case again, as was recently interpreted by the Hamilton versus Lumpkin case, does not stand for the proposition that it is incumbent upon the defendant to show both the actual prejudice and the intentional governmental delay.

The Court in the Marion case merely said that the Government conceded that if the defendant were able to show both the delay, intentional, and [7] actual prejudice, that there would be grounds for a dismissal. The Court only said the Government conceded that. But as is revealed in the Lumpkin case, it is an either/or proposition. It is an alternative proposition. And I would submit that this is exactly what the Court said in this Sixth

Circuit in United States versus Giacalone on page 6 of the opinion as attached to the brief of the United States Attorney. I don't know if the Court has a copy of that before him now.

THE COURT: A copy of the brief of the United States Attorney?

MR. MARIETTI: The U.S. Attorney.

THE COURT: Yes, I do.

MR. MARIETTI: On page 6 of the Giacalone opinion attached thereto, do you have that, your Honor?

THE COURT: Yes.

MR. MARIETTI: At the bottom of the page the Court says—

THE COURT: Wait a minute.

MR. MARIETTI: The bottom of that page the Court says: "Thus, we must accept the general rule that the absence of a showing of intentional governmental delay actual prejudice must be [8] demonstrated. . ." It doesn't say both.

In the paragraph preceding that, the Court says: ". . . we find no evidence that such delay was for the purpose of harrassment or to enable"—or in the alternative—"to enable the Government to gain some tactical advantage over the appellee." It is an alternative proposition.

Now addressing ourselves to the question of prejudice in this case, I think it was very well stated by the concurring opinion of Justice Brennan and Justice Marshall in Dickey versus Florida, 398 U.S. 30, that in fact substantial prejudice is difficult to prove.

If you think about the logic of it, what logic is there in asking a man to assert substantial prejudice because he had forgotten things? If he has forgotten them, how does he know what he has forgotten? It is tautological. And the Court recognized that when they said substantial prejudice is difficult to prove, because how can a defendant reconstruct when he cannot remember?

You have here the fact of an unreasonable delay. There is no asserted valid reason by the United States Attorney, at least that I can glean from his brief. There is no valid reason for the delay.

[9] It is a fact that this defendant has had a difficult time remembering those charges and the details surrounding where he was and what h vas doing on those days, on Counts I and II. We are not here to complain about Count III, we are not here to complain about that. An arrest was made promptly in that case and the defendant has been afforded a fair chance, at least so far as his ability to recall the events at the time of the preliminary examination.

But why, why did they wait on Counts I and II?

We submit the only reason they waited was to further hamper this defendant's ability to assert his defense; and, secondly, to enable them to acquire a further hammer over this informant who admittedly already is obviously biased against this defendant, who is the only thing standing between him and the State's Prison. And we would ask that those two counts be dismissed, your Honor.

MR. SPIES: If it please the Court, I don't want to begin my argument by making excuses, your Honor, but this case has been handled through the investigatory stage right up through this point by one of my assistants, Robert Greene, who is at the hospital with his wife today. I lack some [10] knowledge of the background, but I am prepared to respond to the arguments as I heard them today.

The first question is, there is some speculation by the defendant about improper motives, but he suggests the very reasons why the narcotics' investigations are often delayed, that is, if an informant is being used in more than one—against more than one narcotics' dealer, there is often a delay. The law enforcement doesn't want to burn that informant, doesn't want to disclose that he has been an informant, number one.

Number two, it is certainly beneficial to accumulate more evidence. If the defendant—very often more counts will confirm. Obviously the defense will be that this man was a narcotics' agent, but the more counts, the more—the less likely this defense becomes.

There is a question as to the period January to March, and my date book indicates there wasn't a Grand Jury

available during that period, and this would—our office has not asked for Grand Juries to be brought in promiscuously over the past few months. Now we recognize that the Grand Jury, under the Speedy Trial Act, will have to be coming monthly or bimonthly, but in the past they have not brought in weekly or [11] monthly, and there appears to have been no Grand Jury from the time of the arrest in January, in late January, to the Grand Jury indictment returned in early March.

We are going to stand on the two Sixth Circuit cases, Ross versus United States, which is cited in our brief, and United States versus Giacalone, which we would suggest are the authority in this case.

Giacalone, particularly, has come down since the Supreme Court in Marion, and the Sixth Circuit had the benefit of that decision when it rendered its decision.

We feel those two cases are controlling here.

The Sixth Circuit made the point in Giacalone where a District Judge had dismissed in similar circumstances, to hold that it was an abuse of discretion to do so.

Finally, I think the most interesting factual point that has been raised by the defendant today is that defense counsel says this defendant was an undercover narcotics' officer; why, he dealt in so many transactions involving narcotics, how would he remember this one?

[12] Now, presumably the defense will be that he was working as an undercover narcotics' officer. Your Honor, if he was working as an undercover narcotics' officer when he dealt with the people who are involved in these counts, wouldn't he have made records of this? If he was an undercover narcotics' officer trying to make a case, he would have made a case report, as all good law enforcement officers would do. He wouldn't rely on coming back months later and making an arrest himself, unless he had made reports of this. And so now counsel is now telling us, "Why this man is an undercover narcotics' officer. He wouldn't have any reason to remember this dealing in narcotics, he deals so many times."

Well, your Honor, if he is dealing as an undercover narcotics' officer, he would make a report of it. He would

have his report and he could refresh his recollection from his report.

I think that the factual issue raised here to show prejudice pretty clearly shows the need of trying these three counts. So this is basically our position, that the very grounds they are arguing prejudice shows why these particular counts should be heard by this Court, number one. And number two, under the Sixth Circuit decisions, Ross and Giacalone, [13] that there has been no improper delay shown here.

MR. MARIETTI: Your Honor, I believe if I might respond, since I am the moving party, I would agree with the DA's characterization, that if this man is an undercover narcotics' officer, that he indeed would have records, and most certainly this man would have records because he kept very accurate records, unless of course it didn't happen, which is going to be the issue in the trial.

And I will take issue with his anticipating the defense, because you are dealing in this case with the word of a known Heroin peddler against this man, and that's what this case is going to boil down to, a man that now has four charges hanging on him. That is what the case is going to boil down to, and of course there wouldn't be reason to keep records if it never happened. That's my response to that argument.

I would, furthermore, if the District Attorney is attempting to assert a justification for this delay on the basis that this man, Mr. Jordan, who is the informant in this matter, was working another undercover in other undercover operations, I would ask him, if he can, to produce one other warrant that this man brought against any other defendant prior to the [14] time that his so-called cover was blown by the arrest of Mr. Scott, one other warrant. I will submit there aren't any. At least my investigation reveals that, not one. There absolutely was no justification for this delay.

Now the District Attorney further attempts to justify the delay between January and March on the basis of inability to convene a Grand Jury. There was no Grand Jury convened when John Scott was arrested in January,

there was no Grand Jury convened when he was complained against by the District Attorney's Office for an offence that occurred on September 22nd, which is Count II in this case. It was done by Complaint and Warrant. But yet they chose, as far as Count I goes, to wait after the cover was blown, and I submit that isn't even relevant here because there will not be another warrant that this man has made during that delay period, but they still chose to wait even after his so-called cover was blown. They could have proceeded by Complaint and Warrant at that time, but they didn't, and I would submit there has been no justification here for the delay, and it has worked to the prejudice of my defendant.

THE COURT: Do you have other motions now?

[15] MR. MARIETTI: Would you like me to proceed to the next motion, your Honor.

THE COURT: Yes.

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UNITED STATES OF AMERICA
IN THE DISTRICT COURT OF THE
UNITED STATES FOR THE
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

G75-54 Cr.

[Filed Nov. 20, 1975]

UNITED STATES OF AMERICA, PLAINTIFF

v.

JOHN ARTHUR SCOTT, DEFENDANT

ORDER

A hearing having been held on the motions to dismiss Counts I and II, and to sever all counts to be tried, IT IS HEREBY ORDERED that:

1. The motion for severance is denied, and
2. The motion to dismiss is denied without prejudice, so that the defendant may reassert it if he chooses after all evidence has been presented.

Dated: November 20, 1975.

NOEL P. FOX
Chief Judge
United States District Court

CERTIFIED AS A TRUE COPY
Gerald H. Liefer
Clerk

BY /s/ J. G. Sale
Deputy Clerk

TRANSCRIPT OF TRIAL

[292]

• • • •

REDIRECT EXAMINATION OF STEPHEN YOUNG

BY MR. GREENE:

Q. Mr. Young, there was testimony about continued investigation after Agent Best is at Mr. Jordan's house —it [293] must be the second purchase; why didn't you arrest Mr. Scott at that time?

A. In narcotic investigations, we let them run. We don't arrest at the first time the crime has been committed. One has to see what stature a person has in the narcotic trade, whether he is just a run for somebody or whether he is actually the individual who is causing all this to happen.

Also that the investigation revealed that there may be other police officers involved in this. Also there was talk during the investigation that he had been ripping—

MR. MARIETTI: Well, I am going to object to this, your Honor. This is obvious hearsay evidence.

MR. GREENE: Your Honor, I would note that the question was asked before, what was the purpose, why didn't he ask, why didn't you arrest, he was asked several times. The Government would like the answer why he didn't arrest him.

THE COURT: Any hearsay testimony in this regard is stricken and should not be considered by the jury. That was hearsay testimony, rumors or what knowledge.

Q. Specifically within your own knowledge, why didn't you arrest him?

A. We wanted to continue the investigation. First of all, [294] this was Agent Best the first time around, and we generally, as a general rule, do not arrest on one occasion. You let it go two, three, four, five times to see exactly where the drugs come from.

• • • •

[297] MR. MARIETTI: I am going to renew the motions on the pre-indictment delay at this time and move

it on the record for a judgment of acquittal on all three counts.

THE COURT: I think that what you better do is have some more evidence before we can consider whether there was undue delay or any prejudice, otherwise you are in the position now where the arguments that you made before would be about the same?

MR. MARIETTI: I would offer to the Court and make a separate hearing on that issue at this time.

THE COURT: All right. Take the jury to the jury-room.

[298] (At 2:09 p.m. the jury was excused from the courtroom and the following proceedings were had:)

MR. MARIETTI: Your Honor, at this time the defendant, John Scott, would renew the motions that were previously filed in this case and denied without prejudice, to dismiss Counts I and II, for the preindictment delay in this matter. We submit to the Court, as we did at the time of the argument of the original motion, that based on the testimony we have heard here from Agent Young, which we didn't have at the time of the motion, that there was an intentional and deliberate delay on the part of the Government.

The case cited by the District Attorney in our original argument cited by myself, which I believe was the Giacalone case, G-i-a-c-o-l-o-n-e, indicated that in the absence of a showing of intentional delay on the part of the Government it was incumbent upon the defendant to show actual prejudice.

While I don't feel in this case that there is any absence of a showing of intentional delay on the return of these indictments by the Government, and under the holding of that case I do not feel it is incumbent upon this defendant to show actual prejudice, the potential for prejudice, as we stated to the Court at the time of our argument, is there, and that is contained [299] in our brief, as it was originally stated, and we feel that is sufficient based on the holding in Giacalone, for dismissal of these indictments given this testimony of Agent Young.

THE COURT: Mr. Greene.

MR. GREENE: Your Honor, the Government would note that there has been a more recent Sixth Circuit decision—I think it came down in the last ten days—on pre-indictment delay, which the motion was denied. I think it was after seventeen months. Since I did not expect to argue this today, I did not pick up the latest case. However, I would also note that all the cases in reference to the pre-indictment delay, or delay at any time, allows for reasons for the Government to delay, I think the continued investigation in a narcotics case is one of the reasons stated; suspects, other suspects, other opportunity to obtain drugs. And all these have been recognized as a reasonable reason for a delay in that case.

And, again returning to the Sixth Circuit case, I still contend that actual prejudice must be shown. To go back to the old Sixth Circuit ruling, it used to be the Statute of Limitations, which was modified over the last eight months; two, the showing that there must be prejudice. Based on the recent decisions of the Sixth [300] Circuit, it just hasn't been shown. The Government had ample reason to continue the investigation for a longer period.

And, finally, seven months is not long. I think the Sixth Circuit in the cases before them so far has ruled twenty-five months does not necessarily indicate a dismissal. Definitely seven months would not fall under that.

For those reasons I would ask it be denied.

THE COURT: In the present status of the case and the apparent law in the Sixth Circuit, I will have to deny the motion.

Proceed.

MR. MARIETTI: I take it is denied without prejudice at this point to renew it?

THE COURT: Yes.

MR. MARIETTI: Your Honor, at this time the defendant, John Arthur Scott, would move for a judgment of acquittal on all three Counts in this case.

We have heard testimony in this case with regard to alleged delivery of certain drugs, to-wit, codeine, cocaine, and heroin.

The testimony, as to the observation of those alleged deliveries, has come solely from the mouth of Robert Jordan in every case, a paid informant, an infor- [301] mant who has no less than four charges at this time hanging over his head, one of which was brought by this Officer.

There is absolutely no evidence—

THE COURT: Aren't these questions of fact which go to the jury and not for the Judge to decide? The Judge can't make decisions on the fact issue. That is solely within the province of the jury.

Are you saying that the Government's evidence is insufficient to create an issue of fact to go to the jury?

MR. MARIETTI: I am saying I would like a ruling on that issue when we have this type of testimony from a paid Government informant who is—

THE COURT: That is a question for the jury.

MR. MARIETTI: With the charges hanging over his head, the Court is ruling that is a question for the jury alone?

THE COURT: Yes, that is a question for the jury.

MR. MARIETTI: Fine. I take it my motion is denied?

THE COURT: Yes.

MR. MARIETTI: Very well.

[302] THE COURT: I can't see any straight proposition of law which would support a motion for a judgment or his acquittal at this time. The status of the record at the present time is such that if you were to rest now I would have to submit it to the jury to be decided. I couldn't do it myself.

• • • •

[403] Q. Do you recall where that was?

A. I met him at the—I met him at a bar, the Buckboard, I believe, Bar on Broadway in Muskegon. It was in Norton Shores.

Q. Were you offered any money at that time by Mr. Jordan?

A. Yes, sir.

Q. How much money did Bobby Jordan offer you?

A. He originally offered me $3,000. Then he was talking about $10,000, and on this occasion he offered me $800.

Q. What did you do?

A. I refused.

Q. Were you wired at that time?

A. No, sir.

Q. Did you make a report of that?

A. No, sir—yes, sir. Correction, I did make a report.

Q. Is that one of the reports that have been marked as Defendant's Exhibits?

A. Yes, sir.

Q. Did you advise—strike that. Did you actually type the report up yourself?

A. Yes, sir.

Q. Did you actually submit it to Lieutenant Jurgens?

A. Yes, sir.

[404] Q. Have you ever accepted a bribe from Bobby Jordan, Officer Scott?

A. No, sir. No, sir, I never have.

Q. And you reported these items?

A. Yes, sir.

Q. After this attempt by Bobby Jordan to bribe you, did you ever have any more contact with him?

A. After a period of time, yes.

Q. Do you recall what the reason for the contact was?

A. Yes, sir.

Q. What was the reason?

A. Robert Jordan wanted to work for me.

Q. Did he state why he wanted to work for you?

A. Yes, sir.

Q. What did he say his reason was?

A. Because he knew that I was instrumental in his being arrested in Grand Haven, and he had the charge pending on him in Grand Haven, and he felt if he worked for me and he was proven reliable and supplied me with a number of good busts, he wanted me to write a letter of recommendation to the Prosecutor and the Judge in Grand Haven.

Q. Now when you say "bust," what does that term mean? We are not familiar with that term, Officer Scott.

A. Well, this is street language for arresting a party, taking off a house. It they got drugs, you go in and you arrest [405] all the people in there. And people you know dealing, you arrest them for possession, and people that are just visiting, you arrest them for frequenting.

Q. Did you do any surveillance or investigation of Bobby Jordan?

A. Yes, sir.

Q. Had you made your fellow officers aware of your investigation of Bobby Jordan?

A. Yes, sir. We had conversations about Robert Jordan's activities almost daily.

Q. You have sat here patiently and listened to the accusations that Bobby Jordan made the other day, didn't you?

A. Yes, sir, I did.

Q. Do you recall—I believe he used the date of September 10th—where you were on September 10th?

A. No, sir.

Q. You have no recollection?

A. No, sir.

Q. Have you tried to remember where you were?

A. Yes, sir.

Q. He also mentioned the date of September 19th. Do you have any recollection of where you were on the 19th?

A. No, sir.

Q. Have you tried to remember that, too?

A. Yes, sir.

[406] Q. Do you have any recollection of where you were on the 20th of September?

A. I have heard that date mentioned in here, but I have no recollection, no.

Q. Did you ever have any phone conversations with Mr. Jordan?

A. Yes, sir, many times.

Q. Many times?

A. Many times.

Q. Did there ever come an occasion when you discussed with him on the phone any particular bust that you wanted to be involved with?

A. Yes, sir.

Q. Were you ever investigating a bust involving a large shipment of marijuana?

A. Yes, sir.

Q. Do you ever recall discussing that particular bust with Bobby Jordan?

A. Yes, sir. He was involved in this, he was involved in the investigation.

Q. Did you ever discuss this on the phone with him?

A. I may have, yes.

Q. Do you recall having a telephone conversation specifically on September 20th?

A. No, sir, I do not.

Q. Do you recall what the nature of this shipment or bust [407] regarding this shipment was?

A. Yes, sir. I can remember some parts of it. It is kind of sketchy, but I do remember the incident, yes, sir.

Q. What do you remember about it, Officer Scott?

A. Robert Jordan and I had had some conversations previously, and we had discussed the possibility of going into a partnership with another gentleman who was to order from Mexico a semi-truck of marijuana.

Q. And what was the arrangement in terms of a purchase price for that truckload?

A. We were to put up $5,000 apiece.

Q. Who is we?

A. Robert Jordan and the other party that was to be involved in it and myself.

Q. Now, why did you want to be involved in this situation?

A. I was interested in taking the truck off when it came off. By that I mean arresting the driver for possession and delivery, and also the other party for conspiracy to transport marijuana across the state lines.

Q. And how much were each of you required to put up?

A. Five thousand.

Q. Now was it your intention to actually put up $5,000 and purchase drugs yourself?

A. No, sir.

Q. Did you attempt to lead Jordan on to believe that?

[408] A. Yes, sir.

Q. Did Jordan ever ask you to produce any drugs for this third party? If you don't remember, say so. If you do, say so.

A. I don't think so. He may have. He may have asked me to actually flash some, I don't know.

Q. Did you ever indicate to him that you would flash drugs?

A. Yes, sir.

Q. Did you in fact ever do that?

A. No, sir.

Q. Why did you tell him you would, Officer Scott?

A. Because in the type of work that I was dealing in, it was quite common at times where individuals will ask you these things, and where they would place objects on the table, they ask you to hand them to them, they want to see if you have got anything, and you have got to be prepared.

Q. Like the time when he asked you to pick up the packet and you wouldn't?

A. Yes, sir.

Q. And you are stating you may have discussed that situation on the telephone and you may not have, you can't remember?

A. I don't really remember. We may have discussed that.

Q. Now you said you can't recall where you were on the 10th or the 19th or the 20th; do you recall September 24th, [409] that date specifically?

A. I remember some at the—some parts of September 24th.

Q. You have heard the accusations that Bobby Jordan made surrounding that date, haven't you?

A. Yes, sir.

Q. Do you actually remember that date or do you remember some of the incidents that happened that day?

A. I remember the incidents that happened on that date.

Q. Do you recall receiving a telephone communication from Bobby Jordan on that date?

A. Yes, sir.

Q. How is it that you remember some of the things that happened on that date but you can't remember these other dates?

A. Well, on this day, I don't remember the day or the date, but I remember the incident because on this particular date he asked me to do some specific things.

Q. Did you ever make any notes on that transaction?

A. Yes, sir.

Q. Do you have those notes with you?

A. No, sir.

Q. Did you have an opportunity to review them?

A. Yes, sir. The notes were—all my notes and records and everything were confiscated by my attorney and Lieutenant Rudy Jurgens so they couldn't be altered in any way at [410] that time. But, however, subsequent to that I was allowed to review the notes.

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[556] (THE DEFENDANT RESTED.)

MR. GREENE: The Government has no rebuttal witnesses, your Honor, so the Government also rests.

(THE GOVERNMENT RESTED.)

THE COURT: All right. We have some motions, and so the jury will be excused until 9:30 tomorrow morning, and we will go ahead with the motions.

Remember, don't talk to anyone about this case or read any newspapers or listen to any TV's or radios.

(At 4:35 p.m. the jury was excused from the courtroom, and the following proceedings were had:)

THE COURT: You may proceed.

MR. MARIETTI: Your Honor, at this time the defendant would renew the previous motions filed preliminary to trial and renewed at the conclusion of the Government's case, to dismiss Counts I and II on the basis of a denial of due process for the pre-indictment delay.

We have already set forth to the Court a written argument on this particular point. We have orally argued it to the Court at a pretrial hearing, and we argued it briefly to the Court at the conclusion of the Government's proof. The Court at that time expressed its desire to hear further proofs before deciding the [557] motion.

We submit, your Honor, quite simply, that based on the testimony that was elicited from the Government's agents in this matter, there is no question but that the delay of the Government was both deliberate and intentional in this matter.

We submit that the prejudice to the defendant was rather obvious today when he took the stand and was forced to say on direct examination—I don't know how many times—"I don't recall." "I can't remember." And it is particularly significant, your Honor, that his recall of the events surrounding the day that he was arrested, as the Court may have observed, were rather precise, correct, and to the point.

However, as to the 24th, as charged in Count II, as to the 20th, as charged in Count I about which we have never heard testimony before prior to the commencement of this trial, and to all those other transactions that were admitted into this record about delivery of alleged controlled substances by Mr. Scott to the informant, he simply can't recall anything about those dates. He knows he never delivered drugs, but he can't recall.

I think it was obvious to the Court that he was being honest, because when he could recall something, [558] he was quite direct about it.

Now the Government's case is—with regard to Counts I and II, as they stated in their opening argument and as they have presented the evidence, involves an intricate set of facts and an allegation of a scheme or a plan or a connected series of transactions which involved Officer Scott, stretching back to September 9th or 10th all the way up through and culminating the 24th, and the de-

fendant has expressed over and over and over again his inability to recall, and we suggest that that is a result of the delay, a delay that was unjustified, intentional and deliberate.

As the Court cited or as I have cited in my cases, it is ridiculous or tautological to consider the question or to put the defendant in the position of trying to state to the Court what he could not remember. Obviously if he can't remember it, he doesn't know what it is that he can't remember. And to probe that question would be merely tautological inquiry, and we submit to the Court there is ample evidence of serious prejudice and substantial prejudice of this defendant to rebut or to present facts rebutting the theory of the prosecution with regards to Counts I and II, which was this series of events which were never brought to the attention of this defendant prior to the commencement of this trial, [559] and we submit that as result of the delay there was substantial prejudice to this defendant, and we ask that those first two Counts be dismissed on that basis.

THE COURT: Where is the file in this case?

(The law Clerk handed the Court a file.)

MR. MARIETTI: I would add further, your Honor, that the most recent case that I have been able to find on this subject is United States versus King, 521 Fed. 2d 356, which is a Sixth Circuit case. I believe it was reported in November of this year.

THE COURT: What is the—521 Fed. 2d—what is it?

MR. MARIETTI: 356.

THE COURT: Three fifty-six?

MR. MARIETTI: Yes. Which merely sets forth a proposed test for evaluating need for a dismissal.

THE COURT: All right:

MR. GREENE: In response, your Honor, the Government would note, first, there is a balancing test. There has been testimony of the reasons that Mr. Scott was not arrested on the 20th, on the 24th. An investigation was continued. This testimony was heard by the Court, and the Government need not elaborate on it further.

[560] There was also testimony by Mr. Scott with reference to the transaction on the 24th, which was quite detailed, in reality. He did testify that in reference to the 20th he had no recollection of it, and he specifically testified he had a number of meetings with the defendant, which he cannot recollect in time, dates, a number of telephone calls.

His testimony on the 24th was very specific, and this in itself, the Government would contend, would remove any so-called prejudice on this particular date.

In reference to the 20th, there is the testimony that at no time did he take any drugs, give any drugs to Mr. Jordan, and this he has maintained throughout, no matter what date you chose.

So the actual defense, he is, the defendant is saying it never occurred.

Since you have a balancing test to begin with and ripe for continuing investigation to go on, since in this case the defendant denies explicitly, very explicitly, since the charge is very explicit, since he does have a good recollection of the time on the 24th and what occurred and has testified to such, the Government would contend the prejudice sought has not been reached particularly under the case law, for the reasons the Government has testified to, the continuation of the [561] investigation, the need for it, does establish the right not to arrest the individual at that time, to continue the investigation till a later date.

Finally, the Government notes there is no Federal law, no Federal case known at this time that states seven months, which this would be, September—actually about six months, six months and two days, that this is too long of a time not to arrest and charge a man and indict him. It just does not know of any case at this time that considers this particular period of time is too long, and shows the prima facie cause of prejudice before—the Court needn't consider looking into the matter beyond that point, because on the facts and the testimony the Government contends the motion is without merit and should be denied.

THE COURT: You may respond.

MR. MARIETTI: Well, your Honor, if a justification for the intentional delay and deliberate delay by the Government is for the purpose of accumulating more and more charges against the defendant, then so be it, if that is the justification, "for the purpose of accumulating more charges." But we submit to the Court that this is not simply one or two or three isolated incidents. As I said previously, they have submitted that this is a series of transactions culminating on the [562] 24th. Officer Scott did testify to certain events as he could recall on the 24th, yes, he did. As to how explicit he was, I suppose I would differ with the prosecution, but I would say that that transaction on the 24th was not the only event involved in the theory of the prosecution's case, and these other transactions were.

Now it so happened that Officer Scott, when he was finally permitted to look at his notes not long ago, could remember some of the things that happened on the 24th, but the point is the series here to establish this series of transactions running up to the 24th, and that certainly is evidence that is going to be admitted or it has been admitted bearing upon the existence of a motive or a scheme or a plan through a series of transactions with this defendant, and we submit that his inability to recall, as he stated on the witness stand, is prejudicial and it certainly cannot be justified by the Government's desire to continue to accumulate charges against the defendant.

THE COURT: All right. I will announce my opinion tomorrow morning before the oral arguments. And the oral arguments, we will start the case tomorrow morning at 9:30.

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SUPREME COURT OF THE UNITED STATES

No. 76-1382

UNITED STATES, PETITIONER

v.

JOHN ARTHUR SCOTT

ORDER ALLOWING CERTIORARI

Filed October 11, 1977

The petition herein for a writ of certiorari to the United States Court of Appeals for the Sixth Circuit is granted.

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